IN THE

Supreme Court of the United States

October Term, 1961

No. 897

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

against

CHARLES NOIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT CHARLES NOIA IN OPPOSITION

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Opinions Below

The decision of the United States District Court for the Southern District of New York dismissing the writ of habeas corpus is reported at 183 F. Supp. 222. The opinion of the Court of Appeals for the Second Circuit, reversing the District Court, is not yet officially reported and is set forth as an Appendix to the Petition herein.

On March 2, 1962, the Court below denied without opinion a request for reconsideration *in banc;* Chief Judge Lumbard, Judges Moore and Hays voting for reconsideration and Judges Clark, Waterman, Friendly, Smith, Kaufman and Marshall against.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U. S. C. § 2101(d). This Court appears to have jurisdiction over the petition of Warden Fay under 28 U. S. C. § 1254(1). The "People of the State of New York" were not a party to the proceeding below.

Question Presented

Whether this Court should review the factual determinations by the Court below that (1) relator has not waived his claim of unconstitutional conviction by means of an involuntary confession; (2) special circumstances excused relator's failure to exhaust formerly available remedies; and (3) the decision of the New York Courts denying relator relief was based upon an inadequate state ground.

Statement

Charles Noia, Santo Caminito and Frank Bonino were jointly indicted, tried and convicted of felony murder in Kings County (N. Y.) Court and sentenced on March 2, 1942 to life imprisonment.

The sole evidence of guilt against each of the defendants was a pre-trial confession. All three defendants unsuccessfully contended at their trial that their confession had been coerced by third degree methods. The facts concerning Noia's confession, which are uncontested by the petitioner, are as follows:

Noia was seized and held in custody by the New York City police at the 62nd Precinct in New York from 5:00 p.m. on May 11, 1941 until the morning of May 13th, when he

was arraigned. He was not booked or arrested until after 2:30 a.m. on May 13th when he had confessed (F. 1131);[1]

His wife was in the custody of the police on May 11th and this fact was known to Noia (F. 281, 966-968);

During this period, he was questioned continuously by at least seven detectives (F. 213, 232, 393, 394, 404, 499, 500, 502-507, 513-522, 579-583, 585, 974-976, 1039, 1041, 1061, 1117-1120, 1121, 1132, 1135-1137, 1161, 1202, 1206);

Noia was briefly taken from the station house to his house, where without a warrant, the police broke into his home (F. 564);

The families of all the defendants were in the station house and were refused access to the prisoners (F. 350);

An attorney representing Noia and Caminito tried for two days to see the prisoners but was refused (F. 1070, 1298-1311).

In the early morning of May 12th Noia was placed in an unheated cell, without blankets, etc., described by one police officer:

> "Q. You say there was a bench in the cell; is that correct? A. That is right.
> Q. A wooden bench? A. It is sort of a car fender that lays down off the wall." (F. 577)

During the afternoon of May 12th, two women and a man were brought in to face Noia, Caminito and Bonino.

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[1] Page references preceded by the letter "R" refer to the record of the proceedings in the District Court; references preceded by "F" denote folios in the Record on Appeal in *People* v. *Bonino* and *Caminito* which was offered in evidence by both parties at the District Court hearing but not received. The Court of Appeals was asked to take judicial notice of this Record which had previously been before it in the *Caminito* case, and the Clerk of the Court of Appeals has certified to this Court the copy of the Record handed up to the court below upon argument of the appeal.

The defendants were not told that the witnesses were detectives. Each witness falsely pretended to identify the defendants as the persons who were involved in the holdup and murder.[2]

The day following arraignment Noia was examined by a Department of Correction physician who testified without contradiction:

> "Q. What treatment if any did you give the defendant Noia? A. When I examined him he had a large bruise on his right thigh. He had some contusions of the scalp, and he had some contusions of the lower posterior chest wall, on the left chest wall." (F. 1242)

Testimony by the doctor as to Noia's complaints of pain and police brutality was excluded (F. 1244-5).

Testimony of the co-defendants, while not of the same unimpeachable character as above, is particularly relevant because, while they too claimed coercion of their confessions, they testified that Noia had been far more severely dealt with by the police than either of them. Bonino testified that when he saw Noia prior to the confession:

> "Noia told me that they are going to lock up his wife and baby * * * He lifted up his pants and showed me a bruise. He pulled open his shirt and showed me a bruise on his stomach * * * He said, 'The detectives hit me'." (F. 1442)
>
> "I seen Noia. He was crying."

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[2] At the trial, in his opening statement to the jury, the District Attorney said: "The following morning the detectives decided something had to be done if they were going to get anywhere with this case. They thereafter sent to New York for two female detectives from the Pick-pocket Squad and another detective named Gavin, who they thought looked nothing like a detective, and these defendants were placed in a room and one by one these witnesses, alleged witnesses, were brought in, and they ostensibly identified these defendants as perpetrators of the crime, although they were not actually witness to the crime." See 222 F. 2d 698, 700 n. 1a.

Caminito testified as to events which occurred late on May 11th,

> "Charles Noia came in. I saw he was limping. I said 'what happened?'
>
> • • •
>
> He said 'I just got kicked around a little bit'." (F. 1274-1275)

The next day when he saw Noia,

> "I went over to him. I said 'what happened?'
>
> • • •
>
> He said, 'they threatened to lock up my wife • • • I have been beat so bad I cannot move.' I said 'I was hit too, but take it easy.'
>
> • • •
>
> He picked up his leg and showed me a bruise on his leg, and his side was hurting • • • I said, 'Don't worry they won't arrest your wife I saw her last night.' He said 'Where?' I said, 'Home.' The detective took her home. He said 'Maybe they arrested her.' I said, 'Don't worry • • • Stop crying, don't worry, we didn't do it • • •." (F. 1780-2)

Bonino and Caminito appealed their convictions to the Appellate Division of the Supreme Court of the State of New York, which affirmed the convictions without opinion (265 App. Div. 960); and then appealed to the New York Court of Appeals, which similarly affirmed (291 N. Y. 541). Eleven years later, Caminito made his second timely application to the New York Court of Appeals for reargument which was denied (307 N. Y. 686). Application to this Court for a writ of certiorari was denied, two justices dissenting (348 U. S. 839). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of *habeas corpus*. The writ was dismissed (127 F. Supp. 689). Upon appeal, the United States Court of Appeals for the Second Circuit reversed. The opinion for the Court of Appeals by the late

Jerome Frank sets forth the "loathsome" and "satanic practices" inflicted by the State of New York upon Noia, Caminito and Bonino to obtain the confessions which it used to convict them. A petition to this Court to review the decision of the Court of Appeals was denied (350 U. S. 896).

Bonino then moved to the New York Court of Appeals for reargument of the affirmance of his conviction. The application was granted and his conviction vacated with directions that he be retried without resort to his confession (1 N. Y. 2d 752).

Noia, who had not appealed from the judgment of conviction, moved the trial court for relief in the nature of writ of error *coram nobis*. His conviction was vacated by the court in which he had been convicted upon a finding that his conviction was "manifestly unlawful" and that fundamental justice demanded a new trial (3 Misc. 2d 447, 158 N. Y. S. 2d 683). The Appellate Division of the Supreme Court reversed (4 A. D. 2d 697), holding *coram nobis* unavailable, and the reversal was affirmed by the New York Court of Appeals reported *sub nom People v. Caminito*, 3 N. Y. 2d 596. This Court denied certiorari (357 U. S. 905).

Application was then made to the United States District Court for the Southern District of New York for a writ of habeas corpus (28 U. S. C. § 2241 *et seq.*). The writ was issued and, after hearing, was dismissed with "great reluctance" on the basis of the District Court's conclusion that, although the relator's detention was "patently unconstitutional," it was powerless because of the alleged failure by Noia to exhaust the formerly available remedy of direct appeal (183 F. Supp. 222). The Court of Appeals reversed, one judge dissenting, and a *sua sponte* application for reconsideration *in banc* was denied by a six to three vote of the full court.

Argument

A consideration of the petition in this case must be grounded upon a recognition of the fact that a flagrant violation of Noia's right to due process of law appears affirmatively upon the face of the record and has not been contested by the Petitioner. However, the Petitioner, on the basis of three legal concepts, namely (1) Exhaustion of State remedies; (2) Waiver or forfeiture; and (3) Adequacy of State grounds, argues that the Court of Appeals should have denied relief in spite of the clear violation of Noia's constitutional rights. What the petition fails to state or recognize is that, as to all three procedural principles which the Petitioner relies on to deny justice to Noia, the Court of Appeals upheld the legal contentions which the Petitioner presents here. However, the Court of Appeals found, upon the particular facts, special circumstances which bring this case within well recognized exceptions to the general principles relied upon by the Petitioner. As this Court stated in *Frisbie* v. *Collins*, 342 U. S. 519, 520-521, in rejecting a similar contention by a State:

> "Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals."

Here the district court recognized the basic injustice in denying relief from the "patently unconstitutional detention." For this reason it denied relief with "great reluctance." What the district court did not recognize, and what the Court of Appeals did correctly realize, was the clear application to the facts of this case of the above principle enunciated by this Court in *Frisbie* v. *Collins*, *supra*. For these reasons, review by this Court is not warranted.

1. Exhaustion of State Remedies

Prior to the decision in this case, the Court of Appeals for the Second Circuit had specifically left open the question of whether 28 U. S. C. § 2254 referred to presently or formerly available remedies. *U. S. ex rel. Wissenfeld* v. *Wilkins*, 281 F. 2d 707, 711-712 (1960). See also Mr. Justice Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, William H. Leary Lecture, October 26, 1961 (apparently unpublished); Hart, *The Supreme Court, 1958 Term: Foreward: The Time Chart of the Justices*. 73 Harv. L. Rev. 84 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961).

Notwithstanding this authority, the court below did not find in Noia's favor on the question of whether Section 2254 refers to presently or formerly available remedies. The court assumed the latter requirement—adversely to the Noia—but found sufficient unique and compelling facts upon which to invoke the universally recognized "special circumstances" exception to the statutory requirement.

2. Waiver of Forfeiture

The Court of Appeals has found that Noia did not waive or forfeit his claim by failure to appeal from the judgment of conviction. This determination was based upon the majority's appraisal of the totality of the circumstances surrounding Noia's failure to appeal.

At some unspecified time within the thirty days within which a notice of appeal could have been filed Noia consulted with his trial counsel in the county jail. The attorney testified at the hearing below that at this consultation Noia was very upset for having been convicted of a crime he claimed he did not commit (R. 57); that Noia always maintained his innocence (R. 60); that Noia was without funds to

retain appellate counsel (R. 54-58); that he, Noia's counsel, felt that the conviction was unjust but that he did not think it his duty to file a notice of appeal to protect the defendant if he later changed his mind and obtained the money necessary to perfect the appeal (R. 61). Counsel also discussed with Noia the "Hull Case" which involved a defendant who received a life sentence, had his conviction reversed on appeal and was sentenced to death upon retrial (R. 59).[3]

From this testimony, the court below found that there had been no conscious waiver by Noia of his right to be tried without the use of the coerced confession.

Judge Moore, in his dissenting opinion does not disagree with the majority in its holding that the question of waiver must turn upon the particular facts in a given situation. Rather the dissent seems to be based upon the failure of the court below to return the case to the District Court for specific findings of fact (See opinion, Appx. to Pet., pp. 47-48).

Not even passed upon by the Court of Appeals was the question of whether the waiver doctrine has any application at all to the facts of this case.[4]

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[3] It should be noted that the trial judge had told Noia immediately prior to imposition of sentence that he had made up his mind to send Noia to the electric chair but that on the morning of sentence his (the judge's) wife had pursuaded him to be merciful and impose a sentence of life imprisonment (F. 2262).

[4] It was urged by the relator in the court below that the use of a confession, coerced as a matter of law, is a jurisdictional defect. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Burns* v. *Wilson*, 346 U. S. 844, dissenting opinion, Frankfurter J. (1953) and that the use of a coerced confession deprives the trial court of "particular" jurisdiction (i.e., the power to proceed to judgment). Cf. *Frank* v. *Mangum*, 237 U. S. 309, at 347, dissenting opinion, Holmes, J. (1915). If the use of a coerced confession results in a loss of jurisdiction then it cannot be waived by failure to appeal if the coercion appears affirmatively on the face of the record. Cf. *In re Snow*, 120 U. S. 274

3. Adequacy of the State Grounds

Both the majority and dissenting opinions in the Court of Appeals assume the applicability of the doctrine of "independent and adequate state grounds" to *habeas corpus* proceedings. The heart of the opinion below lies in Judge Waterman's statement:

> "In determining whether the relevant state ground is a reasonable bar to federal rights—or whether the case is sufficiently exceptional so as to excuse an earlier omission of a state procedure—the federal courts should consider the clarity and the magnitude of the substantive federal right violated. The reasonableness, and hence the adequacy of the state procedural bar, is inversely proportionate to the importance of the federal right and the clarity of its violation." (Appx. to Pet., p. 31.)

The majority then found the clarity and the magnitude of the violation of Noia's rights so extreme that the procedural bar was unreasonable or insufficient to preclude consideration of the violation of his substantive federal rights. Neither Judge Moore, in his dissenting opinion (Appx. to Pet., p. 54), nor the petitioner herein (Pet., pp. 17, 18), disputes that the adequacy of a state procedural ground is open to question in an *habeas corpus* proceeding; but they would, on the facts in this case, find the state ground adequate and reasonable.

(1887); *Neilsen, Petitioner*, 131 U. S. 176 (1889). It was relator's contention in the court below that the coercion appeared on the face of the record and consequently the trial court had lost jurisdiction. Thus, the judgment, interposed by the Warden of Greenhaven Prison as a defense to the habeas corpus petition, was void. *Brown* v. *Mississippi*, 297 U. S. 278, 286-287 (1936); *Blackburn* v. *Alabama*, 361 U. S. 199, 210-211 (1960). Contrast Noia's showing on the face of the record of a violation of the Constitution with the failure of the petitioners in *Daniels* v. *Allen*, reported *sub nom. Brown* v. *Allen*, 344 U. S. 443, 482-485 (1953) and *Michel* v. *Louisiana*, 350 U. S. 91 (1955) to preserve their claims by making a showing of the violation of their rights in the state court trial record.

Not passed upon by the court below was the question of whether the doctrine of "independent and adequate state grounds" has any application to habeas corpus proceedings. This Court, in two cases has clearly implied that this doctrine only applies to the power of this Court on direct review of judgments or orders of state courts. *Darr* v. *Burford*, 339 U. S. 200, 208-209 (1950); *Young* v. *Ragen*, 337 U. S. 235, 238 (1949). These decisions are consistent with the nature of the Writ which lies to challenge the lawfulness of detention, not the correctness of any particular state court decision.

The petitioner herein suggests that the decision below will result in a breakdown of the appellate procedures enacted by the states, destroy something which goes to the structure of our federal system without good reason, and let loose a deluge of habeas corpus applications upon the district courts. Answering these suggestions in order—

First, for a defendant to avail himself of the holding in this case, he must consciously abandon all claims of reversible error under state law; he must give up every claim that rests upon disputed facts; and then he must convince the district court that his is, "The unusual case • • • in which at the very outset it is obvious that on the substantive merits • • • the prisoner should not be imprisoned, and those merits are of constitutional magnitude" (Appx. to Pet. p. 33).

As Judge Waterman noted: "The unique fact pattern in this case is such that few prisoners will find release of Noia to have any applicability to their situations (Appx. to Pet. p. 36).

Second, New York has been given the opportunity to correct the wrong done this man who has sat for twenty years in prison under a conviction based on *no* lawful evidence. The fact that New York provides no relief does not mean the federal courts are powerless to vindicate a clearly established federal right.

Finally, it is hopefully expected that there are few New York (or other) state prisoners whose constitutional rights have been so grossly and cavalierly violated that they may rely upon the decision below in seeking relief in the Federal district courts. But, if there are such persons, they are entitled to relief whether it be by deluge or trickle.

The decision of the court below recognizes the initial and preeminent position of the state courts in the enforcement of the criminal law and the protection of fundamental rights. However, in the peculiar facts of this case, the court below found well recognized exceptions to the general rules of law urged here by the petitioner as grounds for review and the result reached below is an eminently just one which does not require further review by this Court.

The majority decision of the Court of Appeals has corrected a manifest injustice which, under a civilized judicial system, cannot be permitted to continue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Edwin M. Fay for a writ of certiorari be denied and the petition of the People of the State of New York be dismissed.

Respectfully submitted,

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April 1962.